



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
GEORGE E. SCHAEFER,)	
)	
Complainant,)	
)	CHARGE NO(S): 1996CA2562
and)	EEOC NO(S): 21B961966
)	ALS NO(S): 10769
WILSON PET SUPPLY, INC.)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

This matter comes to be heard on Respondent's Motion for Summary Decision along with Respondent's Memorandum in Support of Motion for Summary Decision with an affidavit and exhibits attached. Complainant filed a written Response to the motion with an attached affidavit. The Respondent further filed a Reply Memorandum of Law in Support of its Motion for Summary Decision. Complainant also moved to have the affidavit of Donald Knight stricken. Respondent filed a response to the motion and, in turn, moved to have the affidavit of George Schaefer stricken. The matter is ripe for decision.

CONTENTIONS OF THE PARTIES

Respondent contends that a ruling for summary decision should issue in its favor as a matter of law because Complainant cannot provide direct evidence of discrimination, nor can he produce any indirect evidence to establish a *prima facie* case of illegal discrimination. Respondent argues that Complainant cannot show that he was treated differently than other similarly situated younger employees. Respondent further argues

that Complainant cannot prove that Respondent's articulated reason for its actions was a mere pretext for discrimination, and that there is no evidence that Respondent was motivated by illegal age discrimination. Respondent contends that Complainant has failed to present any evidence that his compensation was restructured because of his age or that the restructuring was an adverse employment action. Respondent further contends that Complainant failed to present any evidence to show that his reassignment was due to his age. Respondent also moved to have the affidavit of Complainant George Shaefer stricken because of the order entered on September 7, 2000 by Administrative Law Judge Michael Evans, which barred any evidence not produced prior to the cut-off date of September 22, 2000.

Complainant objects to summary decision and argues that Respondent treated Complainant differently from other supervisors who were similarly situated. Complainant contends that Respondent is not entitled to a Summary Decision because Complainant has presented evidence of discrimination. Complainant argues that he has provided direct evidence of discrimination and has presented enough evidence to establish a *prima facie* case of age discrimination. Complainant further argues that he has presented evidence to show that his salary was restructured due to his age and that the restructure was an adverse employment action. Complainant also argues that he has presented evidence to show that he was reassigned from his supervisor position due to his age. Complainant contends that his affidavit is verified and anything contained therein is admissible. Complainant further contends that the affidavit of Donald Knight is inadmissible under Supreme Court 191 (A).

FINDINGS OF FACT

Based on the record in this matter, I make the following findings of fact:

1. Complainant, George E. Shaefer, is a male whose age at the time of the alleged incident was 57.
2. Complainant was hired by Respondent, Wilson Pet Supply, Inc., in 1982.
3. In February of 1994, Complainant was employed at Respondent's place of business in the position of Supervisor of the Livestock Division assigned to the second watch.
4. In July of 1995, Donald Knight was hired by Respondent as Operations Manager. Part of Mr. Knight's duties included reviewing and assessing performance output within the company and restructuring employee compensation for purposes of incentive and profits.
5. Throughout his employment with Respondent, Complainant performed his duties in a manner considered acceptable by Respondent until August 31, 1995.
6. On August 31, 1995, Respondent counseled Complainant for giving his son, who also worked for Respondent, inappropriate preferential treatment.
7. On September 5, 1995 and September 7, 1995, Respondent reprimanded Complainant for inaccuracies on the carton counts for outbound shipments.
8. Donald Knight noted in his review of the Livestock Division on October 5, 1995 that numerous errors were being made by the livestock crew, and that there was very little communication and interaction between Complainant and his crew, as well as

Complainant's supervisor, George Siciliano. It was also noted that policies and procedures were not enforced and that new employees were not being properly trained by Complainant.

9. On October 17, 1995, Respondent gave Complainant specific instructions to correct the problems discussed. Specifically, Donald Knight instructed Complainant to prepare a Corrective Action Plan to address the problems brought to his attention.

10. On October 30, 1995, Complainant was counseled for failing to properly train his crew, failing to inspect work of his crew, failing to check the quality of product being shipped, failing to ensure the accuracy of order filling, and failing to control excessive lost sales.

11. During the month of October 1995, three employees on Complainant's second shift Livestock Division resigned from their employment.

12. On October 31, 1995, Respondent gave Complainant a written warning that he was on a "Plan for Improvement" for the next 120 days. The Plan called for Complainant to improve his performance along with that of the Livestock Division. The Plan stated that Complainant would be subject to additional disciplinary action up to and including termination of his position if he did not fulfill the requirements of the Plan. Complainant was also told to submit his Corrective Action Plan by November 15, 1995.

13. On November 27, 1995, Respondent verbally repeated the warning to Complainant and emphasized that Complainant was not exhibiting the change needed to keep his position as Supervisor. Complainant was warned that if his performance did not change he would not continue as the Supervisor.

14. On January 15, 1996, Respondent prepared a follow-up memorandum to Complainant regarding his continued poor performance. Complainant was reminded that he had not submitted his Corrective Action Plan, which had been requested on at least two prior times. Respondent set a new deadline of January 22, 1996 for the Corrective Action Plan, and warned Complainant that his failure to submit the Plan would adversely affect his position as Supervisor.

15. On January 22, 1996, Respondent did not receive the Corrective Action Plan from Complainant. As a result of Complainant's failure to submit the Corrective Action Plan and his continued poor performance, Complainant was issued a final warning that any further poor performance within the next 60 days would result in his replacement as Supervisor.

16. On or about January 19, 1996, Respondent discovered counting errors on two route sheets that had not been verified by Complainant. On or about January 30, 1996, Respondent again warned Complainant of the errors and reminded him that he had failed to submit a Corrective Action Plan. During the week of February 5, 1996, Complainant was counseled, after he was warned previously, for making negative comments about a crewmember who had resigned. On or about February 6, 1996, Respondent discovered five errors relating to Complainant's failure to check route sheets for accuracy.

17. On February 8, 1996, Respondent changed Complainant's salary compensation so as to provide additional incentives for improved performance. As a result of this restructuring, Complainant's base salary was reduced by \$100.00 per week effective February 12, 1996. Complainant became eligible to earn an additional 27

percent of his base salary and up to 114 percent of his previous compensation. In conjunction with the reconstructing of Complainant's salary, he also received a Performance Appraisal Form, which showed that he received a 1.76 out of a possible 5.00 score for performance. This would put him just below the rating of "Partially Meets Expectations" and slightly higher than the rating of "Does Not Meet Expectations."

18. At the conclusion of the February 8, 1996 meeting regarding the change in Complainant's salary, Respondent directed Complainant not to discuss the salary change with other employees.

19. On February 12, 1996, the compensation of Larry Hickman, 39 years of age, was restructured and his base salary was reduced. Other employees, who were not employed in the Livestock Division, also experienced similar salary adjustments.

20. On or about February 15, 1996, Respondent discovered that Complainant discussed the details of the compensation-restructuring meeting with two other employees. Further, since January 22, 1996, Complainant's performance failed to improve.

21. On February 19, 1996, Respondent met with Complainant and decided to remove him as a second shift Supervisor because of Complainant's continuing performance problems and Complainant's violation of instructions regarding their meeting on February 8, 1996. On February 23, 1996, Complainant was reassigned to the order filler's position on second watch and his compensation was changed to \$13.00 per hour. Complainant is still presently employed by Respondent.

22. On March 1, 1996, Phil Olson, 29 years of age, was promoted from Day-Shift Supervisor to Night-Shift Supervisor in the Livestock Division. As of October 5,

1996, Mr. Olson was making \$730.00 per week as the second shift Supervisor for the Livestock Division.

23. On September 7, 2000, Illinois Human Rights Commission Administrative Law Judge Michael Evans entered an Order in this case, which read in part:

“Complainant shall provide a signed and notarized verification for all discovery responses, on or before September 22, 2000. Complainant is advised that any available, but undisclosed, information or documents will be barred from entry into evidence if not produced on or before September 22, 2000.”

24. Complainant failed to submit any verified discovery requests made by Respondent on or before September 22, 2000, as outlined in the Commission Order.

CONCLUSIONS OF LAW

1. Complainant is an “aggrieved party” as defined by section 1-103(b) of the Illinois Human Rights Act, 775 ILCS 5-1-101et seq. (1996).

2. Respondent is an “employer” as defined by section 2-101(B) (1) (a) of the Act and is subject to the provisions of the Act.

3. The Commission has jurisdiction over the parties to and the subject matter of this action.

4. The Commission has adopted the standards used by the Illinois courts in considering motions for summary judgment for motions for summary orders.

5. Complainant has failed to present any direct evidence of age discrimination.

6. Any evidence introduced in Complainant’s affidavit is barred from being admitted into evidence due to the Commission’s order entered on September 7, 2000.

7. Complainant cannot establish a *prima facie* case of age discrimination.
8. Respondent can articulate a legitimate, nondiscriminatory reason for its actions.
9. There is no genuine issue of material fact on the issue of pretext.
10. There is a no genuine issue of material fact on the issue of age discrimination.
11. Respondent has filed competent, admissible evidence to show that the reasons for restructuring the Complainant's salary and reassigning him to a different position were not based on age, but was based upon Complainant's poor work performance and violation of Respondent's instruction not to speak to anyone regarding his change in pay. All of the evidence in the record shows that Complainant's age was not a factor in Respondent's decision to restructure his salary or to reassign him. There is no evidence in the record from which a fact-finder might draw a reasonable inference of age discrimination.
12. Based on the record in this matter, there is no issue of material fact for decision. Respondent is, therefore entitled to a summary decision in its favor as a matter of law.

DETERMINATION

Respondent's Motion for Summary Judgment should be granted because, based upon the admissible evidence in the record, there is no genuine issue of material fact as to Complainant's claim that Respondent discriminated against him on the basis of age.

PROCEDURAL BACKGROUND

Complainant filed Charge No. 1996 CA 2562 with the Illinois Department of Human Rights on February 19, 1996, alleging on his own behalf to have been aggrieved by practices prohibited by Section 2-102 (A) of the Human Rights Act. On April 30, 1997, the Department dismissed Complainant's charge, making a finding of lack of substantial evidence. Complainant filed a Request for Review and the Chief Legal Counsel entered an Order on September 24, 1997, vacating the dismissal and remanding the charge to the Department's Charge Processing Division for additional investigation. On March 17, 1998, the Department issued a second Notice of Dismissal for Lack of Substantial Evidence. Upon request for review by Complainant on September 25, 1998, the Chief Legal Counsel for the IDHR vacated the dismissal and reinstated the charge for further investigation. Pursuant to Section 2-102 (A) of the Illinois Human Rights Act, the parties agreed to extend the 365-day time limit six times for a cumulative total of 420 days. On February 18, 1999, the IDHR issued a Notice of Substantial Evidence on Complainant's claims of discrimination. On March 23, 1999, a Complaint of Civil Rights Violation was filed with the Illinois Human Rights Commission under ALS No. 10769.

DISCUSSION

I will first address the Motions to Strike made by both parties in this matter. As to Complainant's Motion to Strike the Affidavit of Donald Knight, I find no reason to strike any portion of the affidavit, which relies on personal knowledge from the affiant. Supreme Court Rule 191 (Ill. Rev. 1975, ch. 110A, par. 191), governing the admissibility of affidavits, requires that the document set forth facts within the personal knowledge of

the affiant and that sworn certified copies of all papers upon which the affiant relies be attached to the affidavit. It is also true that in deciding a motion for Summary Decision, one may not consider evidentiary matters that would be inadmissible upon a trial of the issue including recitals of facts outside the personal knowledge of the affiant. Hendricks v. Deterts, 13 Ill. App. 3d 976, 301 N.E.2d 625 (4th Dist. 1973). The facts supplied by Mr. Knight, along with the various attached documents have been sworn to by the affiant to be of personal knowledge, and as such is considered to be admissible evidence for the purpose of the motion for Summary Decision. I do, however, find that the portion of paragraph 23 of Mr. Knight's affidavit, pertaining to the reason why former employees of the Complainant quit, to be hearsay with no stated exceptions that would make it admissible. Therefore, that part of Mr. Knight's affidavit is hereby stricken. I also find that paragraphs 48 and 49 of Mr. Knight's affidavit to be irrelevant in this instance since Mr. Kraaz' situation occurred in 1997, well after the incidents involving the Complainant. Therefore, that portion of Mr. Knight's affidavit is also stricken.

As to Respondent's Motion to Strike the Affidavit of Complainant, George Schaefer, I find that the Order entered on September 7, 2000 by Judge Michael Evans effectively bars any facts presented in Complainant's affidavit. Supreme Court Rule 213(d) dictates that written interrogatories be "sworn." The Complainant has failed to tender to Respondent sworn answers to his request for written interrogatories. The Complainant has also failed to comply with the September 7, 2000 Order in that he did not turn over any of the requested documents or written interrogatories by the stated cut-off date in the Order. Supreme Court Rule 219(c) authorizes a trial court to impose sanctions, including dismissal of the action, for a party's unreasonable refusal to comply

with discovery. Imposing sanctions is a matter within the trial court's discretion, and its orders should not be disturbed absent an abuse of discretion. Zimmer v. Melendez, 222 Ill.App.3d 390, 164 Ill. Dec. 836, 583 N.E.2d 1158 (1991). I find that Complainant has not complied with Supreme Court Rules 213(d) and 219(c) when he failed to comply with the Order of September 7, 2000. Therefore, Complainant's affidavit is hereby stricken.

As to this instant case before me, this matter is being considered pursuant to Respondent's Motion for Summary Judgment, so certain special rules must be followed. A summary decision is analogous to a summary judgment. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist. 1993). A motion for summary decision should be granted where there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Strunin and Marshall Field & Co., 8 Ill. HRC Rep. 199 (1983). Because the resulting dismissal of the cause of action is a drastic measure, summary judgment should be awarded with caution. Solone v. Reck, 32 Ill.App.2d 308, 177 N.E.2d 879 (1st Dist. 1961). A court must consider the record as a whole, construing "the pleadings, depositions, and affidavits most strictly against the moving party and most liberally in favor of the opponent in order to determine whether there is a genuine issue as to a material fact." Rivan Die Mold Corp. v. Stewart-Warner Corp., 26 Ill.App.3d 637, 641, 325 N.E.2d 357, 360.

Where the party moving for Summary Decision files supporting affidavits containing well-pleaded facts and the opposing party files no counter-affidavits, the material facts set forth in the affidavits stand as admitted. Glen View Club v. Becker, 113 Ill.App.2d 127, 251 N.E.2d 778 (1st Dist. 1969); and, Fooden v. Board of Governors,

48 Ill. 2d 580, 272 N.E.2d 497 (1971). The party opposing the motion for Summary Decision cannot rely solely on his Complaint to rebut the allegations of fact in a supporting affidavit, and even the allegations of the Verified Complaint of Complainant cannot prevail over the uncontradicted facts set forth in the affidavits presented by Respondent in support of their motion for Summary Decision. Janes v. First Federal Savings & Loan Association, 11 Ill.App.3d 631, 297 N.E.2d 255 (1st Dist. 1973); and, Walsh v. Monumental Life Insurance Co., 46 Ill. Ajpp.2d 431, 197 N.E.2d 124 (1st Dist. 1964).

While Complainant has denied certain of Respondent's allegations in his response and has made other vague assertions in support of his case, these vague and unsworn statements are not the competent, admissible evidence required to support a party's position on Summary Decision. Carruthers v. Christopher & Co., 57 Ill.2d 376, 313 N.E.2d 457 (1974) (fact to be considered are evidentiary facts): see also Loveland v. City of Lewistown 84 Ill.App.3d 190, 405 N.E.2d 453, 39 Ill.Dec. 700 (3rd Dist. 1980).

Looking at the original charge filed with the IDHR, the Complainant alleged that he believed he was discriminated against because of his age, 57, in that he was the oldest employee at the location. The Complainant also alleged that Respondent told him that he was not worth the amount of money he was earning as a supervisor. Looking at the Complaint filed with the Commission, the Complainant alleged that Respondent decreased his salary because of his age, 57, and that Respondent did not decrease Phil Olson's salary. The Complaint also alleges that Respondent demoted Complainant because of his age, 57.

The Respondent maintains that the Complainant had his salary restructured by the operational manager, along with other employees who were younger than Complainant. Even though these individuals did not work on the second shift Livestock Division or were not supervisors, the uncontested facts in this case show that others who were not in Complainant's protected class were treated similarly to Complainant. The record also shows that Complainant's restructured salary was not an adverse employment action, since Complainant could make up to 114% of his previous salary with the introduction of incentives for production and performance. The Respondent further maintains that the Complainant was reassigned from his Supervisor position because of his poor performance and for the violation of the instruction not to speak to anyone regarding his change in pay. Respondent has articulated the problems associated with Complainant's performance, or lack thereof. These include giving preferential treatment to his son, who was employed by Respondent and supervised by the Complainant, inaccuracies on carton counts for outbound shipments, incorrect shipments, unfilled orders, little or no communication or interaction between Complainant and his workers or his immediate supervisor, policies and procedures not being enforced, lack of training by Complainant to his employees, employees quitting, failing to submit a Corrective Action Plan as instructed even though he was given several deadlines, and failing to improve his performance after being placed on a "Plan for Improvement" for 120 days. The Respondent denies that age was a factor in their determination to reassign the Complainant.

Generally speaking, in order to establish a prima facie case of discrimination, complainants need only present facts establishing that 1) they are members of a protected

class; 2) they suffered an adverse employment action by the respondent; and 3) similarly situated co-workers not in their protected class were treated differently. Dixon and Borden Chemical, 46 Ill. HRC Rep. 116 (1985).

Complainant has not presented direct evidence of discrimination, so he must, if he can, present indirect evidence of race discrimination, using McDonnell-Douglas v. Green, 411 U.S. 793 (1973). Under McDonnell-Douglas, once a complainant has established a prima facie case with indirect evidence, a rebuttable presumption of discrimination arises and the respondent must articulate a lawful reason for its actions. (Clyde, 564 N.E. 2d at 267). If respondent articulates a lawful reason for its actions, the presumption dissolves. (*Id.*). Once a respondent makes an articulation, the emphasis of the case changes and the decisive issue becomes whether the reason articulated by the respondent for its actions is a pretext for discrimination. (Clyde, 564 N.E. 2d at 267). Pretext can be established by showing the proffered reason has no basis in fact, or, that the proffered reason did not actually motivate the respondent, or, that it was insufficient to motivate the respondent. (Kier v. Commercial Union Ins. Co., 808 F. 2d 1254, 1259 (7th Cir. 1987)). A showing of pretext allows that trier of fact to infer discrimination, but does not require the trier of fact to do so. (St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742 (1993)). Based upon the review of the record in this matter, the Complainant has failed to present any indirect evidence of discrimination based upon age.

The Human Rights Act defines race discrimination in employment as prohibiting discrimination in employment because of a person's age and forbids covered employers to discriminate based on age "with respect to Recruitment, Hiring, Promotion, Renewal

of Employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment (775 ILCS 5/2-102(A) (1996)).

Based on the record in this matter, there are no issues of material fact as to whether Complainant's age played a part in Respondent's decision to restructure the Complainant's salary or to reassign him. Complainant has not submitted competent, admissible evidence from which a fact finder may draw an inference of age discrimination.

In this instance, the evidence derived from the available facts supplied by the Complainant does not contest Respondent's stated fact that Complainant's salary change was due to a company restructuring effort to achieve more productivity and performance. Respondent's contention that other employees, who were younger than Complainant, had their salaries restructured was never addressed by Complainant. Also, Respondent's contention that the restructured salary allowed for Complainant to make up to 114% of his previous salary as an incentive for production and performance was never addressed by Complainant. Complainant contends that Phil Olson's salary was not restructured. The record shows that Phil Olson was making \$730.00 per week, eight months after being placed in the Night-Shift Supervisor position. The move saved Respondent's \$270.00 in salary per week as compared to the \$1,000.00 per week salary they were paying Complainant. Complainant has not presented any evidence to show that Mr. Olson and he were similarly situated given the fact that Mr. Olson made less money than he did as a Supervisor, nor has he presented any evidence that his restructured salary was due to his age.

The available evidence contained in the record also does not contest the fact that Complainant had a poor performance record and was counseled and reprimanded on numerous occasions prior to the violation of Respondent's instruction not to speak to any employee regarding Complainant's salary change. Respondent stated that an employee by the name of Larry Hickman, age 39, had his salary restructured and also spoke with others regarding his change in salary, but was not disciplined. No evidence was presented that Mr. Hickman had a poor performance record at the time or that he had failed to submit a Corrective Action Plan and was on a 120-day "Plan for Improvement." There was also no evidence presented that Mr. Hickman was instructed not to speak to anyone regarding his change in salary and that he violated the instruction.

The Complainant has not presented any evidence to contradict the facts set out by Respondent's Memorandum in Support of its Motion for Summary Decision. The evidence in the file supports the Respondent's contention that the Complainant was not treated any different from any other of their employees who had their salaries restructured with incentives for the purpose of facilitating work productivity and performance, or who had a record of poor performance and were under a 120-day "Plan for Improvement" and who violated a specific instruction not to speak to any other employees regarding his change in salary. The affidavit of Donald Knight, Operational Manager for Respondent, supports Respondent's contention that their decision to restructure Complainant's salary and to reassign him from his Supervisor position was not based upon the consideration of his age. As in any motion for summary judgment, well-alleged facts within an affidavit must be taken as true when they are not contradicted by counter-affidavits. Conroy v. Andeck, 137 Ill. App.3d 375, 484 N.E.2d 525, 92 Ill. Dec. 10 (1st dist.).

In this instance, the alleged facts contained in Respondent's affidavit are not contradicted by counter-affidavits. Complainant has failed to present any counter-affidavits that would negate taking the one submitted by the Respondent as being true. Under the present circumstances, Complainant has not shown any direct or indirect evidence to support a *prima facie* case of age discrimination.

CONCLUSION

Paragraph 8-106.1 of the Illinois Human Rights Act, 775 ILCS 5/101-1 et. seq., specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. If the pleadings and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. The Commission has adopted the standards used by the Illinois courts in considering motions for summary judgment for motions for summary orders, and the Illinois Appellate Court has affirmed this analogy. Cano v. Village of Dolton, 250 Ill App. 3d 130, 620 N.E.2d 1200, 189 Ill. Dec. 833 (1st Dist. 1993).

There appears to be no direct or indirect evidence in the record to show that the Complainant was treated differently from other employee-supervisors who were similarly situated. As such, the Complainant has failed to establish a *prima facie* case of illegal discrimination. Taking the evidence in the record as competent, it appears that there is no genuine issue of material fact on the issue of whether age was a determining factor in Respondent's employment actions. Therefore, Respondent's Motion for Summary Decision should be granted as a matter of law.

RECOMMENDATION

Thus, for all of the above reasons, it is recommend that Respondent's Motion for Summary Decision be granted, and that the instant Complaint and underlying Charge of Discrimination be dismissed with prejudice as against Respondent.

HUMAN RIGHTS COMMISSION

BY:
NELSON EDWARD PEREZ
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: October 26, 2001